

United States Department of Agriculture



Natural Resources Conservation Service
210 Walnut Street, Room 693
Des Moines, IA 50309-2180

January 12, 2009

IOWA BULLETIN NO. IA210-9-2

SUBJECT: ENG – GUIDANCE FOR USING NATIONWIDE PERMITS 27 AND 40

PURPOSE. To notify all offices of reissued existing nationwide permits (NWP) 27 and 40.

EXPIRATION DATE. September 30, 2010

The U.S. Army Corps of Engineers (ACE) reissued all existing nationwide permits (NWP), general conditions, and definitions. These reissued permits became effective on March 19, 2007.

Two of the NWPs that have the most impact on Natural Resources Conservation Service (NRCS) work with producers are NWP 27 and NWP 40. The following is guidance for utilizing these NWPs. This guidance does not address our responsibilities for complying with the National Environmental Policy Act (NEPA). In all cases, we must follow our policy concerning NEPA requirements for items such as cultural resources and threatened and endangered species.

All ACE 404 permit applications are the responsibility of the landowner or sponsor. The NRCS does not submit 404 permit applications for the landowner or sponsor. The NRCS may supply information and assist in filling out forms, but the applicant must sign and submit the application.

NWP 27 - Aquatic Habitat Restoration, Establishment, and Enhancement Activities

1. This NWP does not apply to isolated potholes. These are not regulated. Currently, most potholes are considered "isolated." However, be aware that there are potholes that are not isolated.
2. This NWP applies to pothole wetlands with an overland connection to a stream, river, or drainage ditch. In this case, ask the ACE if it is a regulated site that is covered by this NWP. To ask this question, send a copy of the wetland determination with a location map, a description of the proposed activity, and a description (with photos and details) of anything that may be considered a connection to a stream, river, or drainage ditch to the ACE at the address shown at the end of this document. If it is a regulated site:
 - A. Pre-Construction Notification (PCN) is not required if the activity is on non-federal public land or private land and is being done in accordance with a binding agreement (ie: an easement) with NRCS or another agency OR if the activity is a voluntary wetland restoration, enhancement, or creation documented in our case files as meeting our standards.

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- B. For these activities which impact wetlands or other waters of the United States but do not require a PCN, the activity still must be reported to the ACE. The following documents must be submitted to the ACE at least 30 days prior to beginning the work:
 - a. A copy of the binding agreement, or a project description, including project plans and a location map.
 - b. Documentation for the voluntary action such as the project description, including project plans and a location map.
 - C. If the work involves wetlands or other waters of the United States and is being done on a site that does not have a permanent easement, a wetland determination must be completed in order to document the prior condition. This determination must be included with the documents provided to the ACE.
 - D. If the activity does require a PCN, the PCN must be in writing and include the following:
 - a. Name, address and telephone numbers of the prospective permittee,
 - b. Location of the proposed project,
 - c. A description of the project including the purpose and any direct or indirect environmental effects of the project,
 - d. Sketches or drawings of the proposed project,
 - e. Wetland determination,
 - f. Proposed mitigation activity, and
 - g. Documentation showing compliance with Endangered Species Act and Section 106 of the National Historic Preservation Act.
 - E. The PCN may be accomplished with the standard individual permit form (Form ENG 4345), joint application form, or with a letter containing the required information. If the standard application form is used, it must clearly state that it is a PCN and must contain the information listed above.
3. For activities/construction involving wetlands or other waters of the United States and located in a riverine setting or in an area that is not a pothole:
- A. On all jobs – If the site may be connected to a stream, river, or drainage ditch, ask the ACE if it is a regulated site. To ask this question, send a copy of the wetland determination with a location map, a description of the proposed activity, and a description (with photos and details) of anything that may be considered a connection to a stream, river, or drainage ditch to the ACE.
 - B. The ACE will determine if it is a jurisdictional site. If it is, they will decide if the project should be authorized by a NWP, regional permit, or an individual permit.
 - a. If the NWP applies, the PCN and reporting requirements are the same as shown above for work in a connected pothole site.
4. Creation of wetlands is allowed under this NWP.
5. Changes in wetlands from one type to another are not allowed under this NWP.
6. A sample letter is attached that can be used to inform the landowner of his/her responsibility to comply with this NWP.

NWP 40 - Agricultural Activities

- 1. Agricultural exemptions defined in Section 404 of the Clean Water Act still apply. This states that upland soil and water conservation practices are exempt from ACE jurisdiction.
 - A. Grassed waterways and the appurtenant outlet structures are considered upland conservation practices.

- B. Ponds that are not exempt or exceed the size limitations defined in the guidance for use of Regional Permit 33 must be authorized under Section 404 of the Clean Water Act using an individual permit.
 - C. The NWP 40 may be used for small ponds. Larger ponds may be authorized using Regional Permit 33 or an individual permit.
2. Activities such as tile drainage, open drainage ditches, dikes, or diversions may be covered by this NWP if there is any activity in a regulated water of the U.S. (including wetlands). For this activity a PCN is required.
- A. The PCN must be in writing and include the following:
 - a. Name, address and telephone numbers of the prospective permittee,
 - b. Location of the proposed project,
 - c. A description of the project including the purpose and any direct or indirect environmental effects of the project,
 - d. Sketches or drawings of the proposed project,
 - e. Wetland determination,
 - f. Proposed mitigation activity, and
 - g. Documentation showing compliance with Endangered Species Act and Section 106 of the National Historic Preservation Act
 - B. The PCN may be accomplished with the standard permit application form (Form ENG 4345), joint application form, or with a letter containing the required information. If the standard application form is used, it must clearly state that it is a PCN and must contain the information listed above.
 - C. No construction shall take place until the ACE responds concerning the PCN and agrees that the action planned falls under NWP 40.
 - D. If the loss of wetlands is over 1/10 acre, the ACE will require mitigation. If the loss of wetlands is over ½ acre, NWP 40 does not apply. (Note: The NRCS will require either a minimal effect determination or mitigation for any wetlands that are impacted.)
 - E. If the activity affects over 300 feet of an ephemeral stream/gully or drainage ditch, the ACE must provide written verification that the project is authorized by the NWP. Mitigation may also be required. (Note: The NRCS mitigation requirements for this activity will be determined on a case-by-case basis.)

The address for the Army Corps of Engineers is:

US Army Corps of Engineers, Rock Island
ATTN: Regulatory Branch
Clock Tower Building
Post Office Box 2004
Rock Island, Illinois 61204-2004
Telephone Number: 309-794-5351
Fax Number: 309-794-5191

The Nationwide Permits can be found on the ACE website at:
http://www.usace.army.mil/cw/cecwo/reg/nationwide_permits.htm

/s/Richard Sims
State Conservationist

Attachment